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September 5, 1995

William F. Caton, Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: In re Application of Ellis Thompson Corporation
For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey
CC Docket No. 94-136
File No. 14261-CL-P-134-A-86

Dear Mr. Caton:

Transmitted herewith on behalf of Ameritel is one (1) original and fourteen (14) copies of its *REPLY TO OPPOSITION* filed with respect to the above-referenced proceeding.

Please contact me directly in the event of any question with respect to this matter.

Respectfully submitted,

Howard S. Robbins
Attorney for Ameritel

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	CC Docket No. 94-136
ELLIS THOMPSON CORPORATION	)	
	)	File No. 14261-CL-P-134-A-86
For Facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey	)	
To: **THE COMMISSION**	)	

REPLY TO OPPOSITION

Ameritel, by its attorney and pursuant to 47 CFR 1.115(d), files herewith its Reply to the *Joint Opposition To Ameritel Application For Review* ("Opposition") filed on August 22, 1995 by parties to the above-captioned proceeding (collectively referred to as "Opposers") opposing the *Application For Review Of Review Board Decision Affirming Denial Of Petition To Intervene Under 47 USC 309(e)* ("Application") filed by Ameritel on August 7, 1995.

1. The Opposition ignores the fundamental question presented by the Review Board's erroneous denial of Ameritel's petition for intervention: how much must be shown at the time of filing of a petition for intervention as of right under 47 USC 309(e) and 47 CFR 1.223(a) to meet the showing requirement of 47 USC 309(e)?[1] How can the showing requirements under 47 USC 309(e) and 47 USC 309(d)(1) be the same in view of the unambiguous language of 47 USC

[1]47 USC 309(d)(1) provides in relevant part that: "[A petition to deny] shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest ..." 47 USC 309(e) provides in relevant part that: "[Parties in interest not notified by the Commission that an application has been designated for hearing] may acquire the status of a party to the proceeding thereon by filing for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register."

309(e) and the unambiguous language differences between 47 USC 309(d)(1) and 47 USC 309(e)? The Opposition is totally silent on the differences in the statutory language.

2. Opposers assert that the Review Board *Memorandum Opinion and Order*[2] is correct, contending Ameritel's statement that it is a party because it is a successor-in-interest to Ameritel, Inc. is just conclusory, and it fails to provide "any supporting facts".[3] However, Opposers fail to state why under the unambiguous language of 47 USC 309(e) more than a showing of the basis for its interest is required under the statute or permitted to be required under the statute.[4] Instead, Opposers perform a legal slight-of-hand, citing two cases having nothing to do with how much must be furnished at the time of filing of a petition for intervention as a matter of right to show the basis of a petitioner's interest.[5]

3. Opposers assert that the Application is meritless because it cites no authority, is contrary to authority cited by Opposers, and the underlying facts said by Ameritel to be erroneous were

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[2]*Memorandum Opinion and Order*, FCC 95R-13 (July 7, 1995) ("*Review Board MO&O*").

[3]Opposition, p.4. Moreover, Ameritel's Petition For Intervention does present facts showing the basis for its interest. See Application, ¶5.

[4]*See Elm City Broadcasting Corporation v. United States*, 235 F.2d 811 (D.C. Cir. 1956) ("*Elm City*") at 816 where the Court held that the Commission may not read into the language "showing the basis for their interest" in the predecessor section to 47 USC 309(e) "words which are not there".

[5]In *Elm City*, *Id.* at 815, the putative intervenor was admitted by the FCC to have sufficient economic injury to be a party in interest. The only basis the Commission had for denying the petition was a rule (47 CFR 1.388(b)) allowing it discretion to deny intervention if the Commission believed it would not assist the Commission in the determination of the issues in question. The Court held that the Commission had no such discretion under the then effective statutory language, 47 USC 309(b), the same language now contained in 47 USC 309(e).

GAF Broadcasting Co., Inc., 54 Rad. Reg. 2d (P&F) 94 and 96, involved a petition for intervention **on a discretionary basis** under 47 CFR 1.223(b), which also requires a showing of how the petitioner's participation will assist the Commission in the determination of the issues in question. The Review Board expressly noted petitioner did not seek intervention as of right under 47 CFR 1.223(a), and its petition contained no allegation of fact whatever related to the issues to be tried at the hearing.

not relied upon by the Review Board.[6] Astonishingly, Opposers state Ameritel cites no authority that the extent of showing required for intervention at the time of filing of the petition is distinct from the extent of showing required for a petition to deny at the time of its filing. Evidently the Opposers believe federal statute is no authority. However, the United States Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court have emphasized that there is no higher authority than the unambiguous, literal language of the statute, and resort to interpretation is unnecessary and improper.[7] Again, Opposers do not address how the showing requirements can be the same where the literal, unambiguous language is different.

4. Opposers authority for their contention that showings are the same in both a petition to deny under 47 USC 309(d)(1) and in a petition to intervene under 47 USC 309(e) is based upon the Commission's decision in *St. Louis Telecast, Inc.*, 43 FCC 2618 (1954). However, that decision, and the other three decisions cited by Opposers for which it is the fundamental authority, deal exclusively with the nature of an *economic* interest sufficient for a party in interest, not the quantum of showing required at the time of filing of the petition for intervention.[8]

[6]In yet another groundless diversion by Opposers, they further assert that the Application is fatally defective procedurally because it fails to reference the requirements of 47 CFR 1.115(b)(5) and does not satisfy them. However, as acknowledged by Opposers, 47 CFR 1.115(b)(5) is applicable only to review of a final decision of the Review Board. 47 CFR 1.301(a)(1) and *Elm City*, supra footnote 5 at 813 and 816-817, make expressly clear that denial of a petition to intervene as of right is an interlocutory ruling appealable as a matter of right as it denies the right of a person to participate as a party to a hearing proceeding. 47 CFR 1.115(b)(2) sets forth the factors warranting review of all matters other than a final decision of the Review Board. The captions preceding ¶¶2, 5 and 7 of the Application directly correlate to several of the cited factors, and any statement to the contrary ignores its plain language.

[7]*Elm City*, supra footnote 5 at 816, "[I]t is elementary in the law of statutory construction that, absent ambiguity or an absurd or unreasonable result, the literal language of a statute controls and resort to legislative history is not only unnecessary but improper. United States v. Missouri Pac. R. Co., 1929, 278 U.S. 269".

[8]Id., at ¶7. In *St. Louis Telecast, Inc.* the Commission considered the grant of a new television station license. An existing television licensee sought to intervene based upon its belief that it would be economically injured by operation of the new station. The Commis-

5. 47 CFR 1.115(b)(2)(v) provides that an erroneous finding as to an important or material question of fact warrants grant of an application for review. **Opposers do not deny that the facts cited by the ALJ were in error or that the ALJ relied upon such erroneous findings.**[9] Rather, Opposers contend that unless the Review Board expressly premises its decision on such findings, it is not a factor warranting review by the Commission. Opposers conveniently ignore the basic legal tenant of the law of the case. Unless the Review Board reverses the ALJ's decision or makes an affirmative finding reversing all such erroneous findings, the ALJ's decision adverse to Ameritel based upon erroneous findings as to important questions of fact becomes the law of the case and unquestionably justifies and mandates review by the Commission.

6. In a most remarkable and highly disingenuous instance of deception, Opposers have misrepresented facts to the Commission, and attempted to conceal their deception by falsely accusing Ameritel of the same.[10] First, Opposers assert that the partners of Ameritel owned collectively a 49 percent, non-controlling interest of Ameritel, and that a stock redemption constituted a prohibited transfer of control of a pending application. Ameritel, Inc. filed an amendment to its Daytona Beach, Florida application that should be apparent to anyone retrieving that record. That amendment corrects the initial statement of ownership interest, making clear

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sion agreed that the nature of the existing licensee's economic injury was sufficient for intervention under 47 USC 309(b). The only question before the Commission was whether the nature of the petitioner's economic interest was adequate for intervention, not how much had to be shown at the time of the filing of the petition for intervention. Thus, the Commission's statement quoted by Opposers in the Opposition at page 6 is clearly limited to the nature of the *economic* interest required for a party in interest. See also, *Radio Lares*, 63 FCC 2d 305 (1977); *RKO General Inc.*, 89 FCC 2d 297 (1982); and *Juarez Communications Corp.*, 56 Rad. Reg. 2d (P&F) 961 (Review Board 1984).

[9]*Memorandum Opinion and Order*, FCC 95M-68 (March 7, 1995) at ¶3.

[10]Opposers, in their Opposition at pages 3 and 8, first chide Ameritel for filing an unauthorized Response to their Oppositions to Ameritel's Petition For Intervention. Opposers then rely on the Response to oppose Ameritel's Application. Ameritel's reference herein to an Exhibit of the Response is necessitated by Opposers misrepresentations of the facts therein.

that collectively the four individuals that are the partners of Ameritel always owned a controlling interest in Ameritel, Inc. Therefore, there was no transfer of control of Ameritel, Inc. Second, Opposers assert that Ameritel, Inc. came into existence on February 21, 1986. In fact, Ameritel, Inc. came into existence on February 3, 1986.[11]

7. Opposers request for expeditious consideration implies that Ameritel could have previously raised this matter and is now solely responsible for delaying final resolution of the captioned proceeding.[12] In fact, the nine year history of the Ellis Thompson application is due solely to the litigious nature of the non-Bureau Opposers. Moreover, counsel for Opposers no doubt know that the Communications Act makes expressly clear that intervention under 47 USC 309(e) is not permitted until after a hearing designation order ("HDO") is published in the Federal Register. The Ellis Thompson HDO was not published until January 5, 1995.

Accordingly, Ameritel hereby respectfully renews its request that the Commission grant its Application For Review, reverse the *Review Board MO&O*, grant Ameritel's Petition to Intervene as a matter of right in the above-captioned proceeding, and designate Ameritel as a party-in-interest in the above-captioned proceeding.

Respectfully submitted,
AMERITEL

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September 5, 1995

[11]See *Rawlings Affidavit* at ¶¶3-7.

[12]Opposers claim Ameritel's Petition For Intervention is "belated" and it has failed to offer other unidentified "submissions".

CERTIFICATE OF SERVICE

I, Howard S. Robbins, attorney for Ameritel, hereby certify that I have on this 5th day of September 1995, sent by First Class United States mail a copy of the "REPLY TO OPPOSITION" to the following:

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